

Examination No. 06-0288.1

Court File No. CA 04-960-SLR

(District of Delaware)

IN THE UNITED STATES DISTRICT COURT

B E T W E E N:

J-SQUARED TECHNOLOGIES, INC., a Canadian Corporation, and
J-SQUARED TECHNOLOGIES (OREGON) INC., an Oregon Corporation

PLAINTIFFS

- and -

MOTOROLA, INC. A DELAWARE CORPORATION

DEFENDANT

DEPOSITION OF MICHAEL NYKOLUK, pursuant to an appointment
made on consent of the parties to be reported by
Cornell•Catana Reporting Services, on March 21, 2006,
commencing at the hour of 8:44 in the forenoon.

APPEARANCES:

COURT COPY

Sean J. Bellow

for the Plaintiffs

Randy Papetti and Emily S. Cates

for the Defendant

This Examination was taken down by sound recording
by Janice West at Ottawa, Ontario, Canada.

1 A. The majority are, yes.

2 110. Q. The majority are?

3 A. Are. Well, they have an automatic renewal
4 in them.

5 111. Q. So would it be fair to say that most of them
6 are for one year but provide for automatic renewal if
7 neither party decides to terminate?

8 A. That's correct.

9 112. Q. Let me show you some documents. Let me mark
10 what we'll call Exhibit 114. Could I ask the Court
11 Reporter to mark this one as Exhibit 114. Hand it to
12 her please and she'll hand it back to you.

13 **EXHIBIT NO. 114:** Power Point Presentation
14 entitled J-Squared and Market Overview dated
15 March 10, 2003.

16 THE WITNESS: Thank you.

17 BY MR. PAPETTI:

18 113. Q. Let me make sure I didn't give you guys
19 mine. I don't think I did. Is it marked up?

20 A. So far I don't see anything.

21 114. Q. Yes, I've got mine, I'm sorry. I've handed
22 you what we'll call Exhibit 114?

23 A. Yes.

24 115. Q. Do you know what it is? Have you seen that
25 before?

1 131. Q. Out of these six, there are Forecasts in
2 here because if I understand the abbreviation right,
3 FCST?

4 A. Yes.

5 132. Q. Is that a Forecast for 2003 and 2004?

6 A. That's correct.

7 133. Q. What is being Forecast?

8 A. Sales for those lines.

9 134. Q. Total sales of the Project, not commissions?
10 Correct?

11 A. That's correct.

12 135. Q. The Forecast for Motorola is how much for
13 2003?

14 A. Three million dollars.

15 136. Q. And the Forecast for 2004 is how much?

16 A. Six million dollars.

17 137. Q. Do you recall how J-Squared came to those
18 Forecast figures?

19 A. I recall how we came to the 2003 figure.

20 138. Q. Okay?

21 A. I do not know how the \$6 million figure was
22 derived.

23 139. Q. Could you tell me what you recall about how
24 you came to the \$3 million for 2003 of Motorola?

25 A. Yes. Well, I can tell you how -- where I

1 2002, maybe February, so we had a history with them and
2 that was the Forecast that we had based on some of the
3 Design Wins and where the business was going.

4 154. Q. Okay, how about IDT?

5 A. That was based on IDT's input to us because
6 they were later in the year and they had provided us
7 with some Presentation material when we interviewed with
8 them to secure their business.

9 155. Q. Now, for the 2004 Forecast figures where did
10 those figures come from? Let's start with Motorola?

11 A. They would have come from Claude Langlois.
12 He was running our Embedded Systems Business.

13 156. Q. So, these would have been Forecasts that J-
14 Squared was coming to on its own for what it believed
15 the sales would be in 2004?

16 A. That's correct.

17 157. Q. That's true for Motorola and the other Rep
18 Lines that are on here -- Product Lines that are on
19 here?

20 A. That's correct.

21 158. Q. And so, J-Squared believes it could take
22 essentially the Forecast for 2003 and double the sales
23 in 2004?

24 MR. BELLEW: Objection.

25 MR. PAPETTI: Is that correct? For Motorola?

O

1 THE WITNESS: For Motorola, yes.

2 BY MR. PAPETTI:

3 159. Q. I want to ask you some more about the
4 conversations with Motorola about the two to \$3 million
5 Forecast for 2003?

6 A. Okay.

7 160. Q. I want to know what the nature of the
8 discussions was a little more specifically. Did anybody
9 on the Motorola side of those discussions promise J-
10 Squared there'd be at least two to \$3 million sales in
11 Canada during that year?

12 A. I'd like to kind of get what your definition
13 of "promise" is? Nobody said "I promise J-Squared will
14 bring in \$3 million".

15 161. Q. Did you view them as any more than
16 Motorola's Good Faith Estimates as to what the business
17 would be in 2003 in the Territory J-Squared would be
18 covering?

19 MR. BELLEW: Objection.

20 THE WITNESS: Yes.

21 BY MR. PAPETTI:

22 162. Q. What did you view them as?

23 A. As Good Faith Estimates.

24 163. Q. My question was did you view them as
25 anything more than simply Motorola's Good Faith

O

1 Estimates as to what the business would be in 2003 in
2 the Territory would be covering?

3 MR. BELLEW: Objection. *O*

4 THE WITNESS: No.

5 BY MR. PAPETTI:

6 164. Q. Do you recall whether Motorola showed you
7 any data during those meetings that played into the
8 Forecast for 2003?

9 A. I seem to recall -- I did not see any data
10 but I seem to recall they asked Ed Kaczor to check into
11 the data during the meeting in September. It goes back
12 quite a ways so -- and we had a lot of different
13 meetings, so -- but I seem to recall -- they said, just
14 check into it and confirm it -- what the numbers were.
15 I mean, you can only really look at the history of the
16 business.

17 165. Q. What had been the trend line at the time of
18 these meetings with respect to Motorola's MCG Business
19 in Canada? Was it trending up sales wise or in recent
20 years had it been trending down?

21 A. It had been trending down from what I was
22 told by Larry Terry.

23 166. Q. Do you recall why or have an understanding
24 why it had been trending down?

25 A. His theory -- Larry Terry's theory was that

1 because they did not have sales coverage for the past
2 year or so in the market besides Nortel.

3 167. Q. Was it your understanding at the time you
4 mean that Motorola had dramatically reduced its sales
5 force in Canada?

6 A. That's what I understood the situation to
7 be.

8 168. Q. How was the general business conditions in
9 late 2002 with respect to the types of customers that J-
10 Squared would be marketing Motorola's products to in
11 Canada?

12 A. I think it was a soft market.

13 169. Q. By "soft" do you mean generally kind of
14 poor?

15 A. Very poor.

16 170. Q. Do you remember what the causes of that
17 were, the general major causes of that were?

18 A. Well, we had a general significant downturn
19 in the Telecommunications business that occurred in
20 2001. So Companies -- the best example I have is Nortel
21 shrunk from 30 billion to 10 billion.

22 171. Q. So at the time you were negotiating or
23 having these discussions with Motorola in July and
24 September of 2002, you were aware that it was a soft
25 business market for the consumers who would buy the

1 products you would be repping for Motorola?

2 A. Well, we actually were a little bit more
3 optimistic about the market and thought it had bottomed
4 out.

5 172. Q. But at the time it was still generally
6 fairly poor?

7 A. It was soft.

8 173. Q. It had been trending downwards for at least
9 over the last year?

10 A. It really took kind of a step function down
11 and then it kind of bounced along the bottom. So in --
12 we could see -- we had a dramatic impact on our business
13 in the fall of 2001. We were sheltered.

14 It actually started early in 2001, the downturn
15 but we were sheltered because of back-logs on components
16 that were non-cancellable -- things along those lines,
17 so our business was sheltered for some time, but the
18 actual Telecommunications downturn started in January
19 and February of 2001.

20 174. Q. These other lines that are on here -- these
21 other five lines besides Motorola, does J-Squared
22 continue to rep all the other five?

23 A. No.

24 175. Q. Which ones did J-Squared no longer rep for?

25 A. IDT, SMC, Motorola and Celoxica.

1 176. Q. So five of the six that J-Squared signed up
2 in 2002 had no longer reps for?

3 A. That's correct.

4 177. Q. Let's go to -- do you have any recollection,
5 I realize you don't have figures in front of you, as to
6 which of these six met the Forecast for 2003?

7 A. I believe that Marvell would have met the
8 Forecast for 2003 and that's it.

9 178. Q. And the other five probably did not?

10 A. SMC would have been fairly close, I believe.

11 179. Q. Okay, and the other four?

12 A. Did not.

13 180. Q. How about for 2004? Were you still repping?
14 I realize the Motorola relationship ended in 2004 but
15 were you still repping the other five in 2004?

16 A. We were Marvell, IDT -- we were. They did
17 not meet the Forecast.

18 181. Q. Who's "they"?

19 A. IDT.

20 182. Q. Okay?

21 A. SMC -- we terminated our relationship with
22 them in 2004 and we were forced to terminate our
23 relationship with Celoxica in 2004 by Mentor so they
24 didn't.

25 183. Q. How about SaRonix?

1 that time but at the end in the next quarter it did work
2 out.

3 233. Q. "Customers Design Cycles" is listed as a
4 disappointment. Do you recall what that references?

5 A. My perception is that the Design Cycles were
6 a little bit longer than we anticipated.

7 234. Q. It took longer for customers to go from
8 expressing an interest to ---

9 A. Concept -- to reality.

10 235. Q. By customers you mean potential ESG
11 Customers?

12 A. That's right. Potential Motorola Customers.

13 236. Q. And it says, "Limited demand creation from
14 Distributors"? What's that reference?

15 A. That refers to the fact that Motorola had
16 Distributors -- I believe they were Aero, Avnet and
17 Tracan in Canada, anyhow I'm not sure about the Pacific
18 North West and they -- our perception was they were not
19 driving any activity for new designs. They were
20 basically looking to inherit business we worked on but
21 were proactively engaged in selling Motorola.

22 237. Q. And so, you had hoped that Avnet, Tracan,
23 and Aero would have been more active in developing new
24 business or assisting you guys in developing new
25 business?

1 A. That's right.

2 238. Q. Let's go to 1871 please?

3 A. Okay.

4 239. Q. This has Forecast Information? Correct?

5 A. Yes.

6 240. Q. Let me know if I'm reading this right. As I
7 read it, there was an original Forecast for 2003 which
8 is the second to last column, Original Sales Forecast
9 for 2003? Is that correct?

10 A. That's correct.

11 241. Q. Then it was revised by the time of this
12 Presentation in the First Quarter of 2003?

13 A. I'm not sure. Is this from that
14 Presentation?

15 242. Q. It appears to all be from the same
16 Presentation? We can go back one page and maybe if you
17 think it's a new document -- I'm pretty sure it's the
18 same document?

19 A. Is it? Okay, well then this Forecast was
20 revised by the time March rolled around.

21 243. Q. Okay, and for the ESG Group, what was the
22 revision?

23 A. I'm not sure where Claude -- where the
24 number came from that Claude went from \$7 million to
25 \$3.5 million. I believe that we must have figured out

1 that the Motorola number wasn't going to be where we
2 thought it was going to be and he revised his Forecast
3 downwards.

4 244. Q. There had been some delay in signing up at
5 least Interphase?

6 A. Yes, and maybe we didn't at that point in
7 time, he didn't look at the revenue stream occurring as
8 quickly as he thought from some of the other lines we
9 were targeting and talking to at the time.

10 245. Q. So by -- near the end of the First Quarter,
11 it looks like J-Square was revising its sales figures
12 down from -- for ESG at least, from \$7 million down to
13 three and a half million? Is that fair?

14 A. Yes.

15 246. Q. Let's go to 1875 please?

16 A. Yes.

17 247. Q. There's a -- the heading on this page is
18 "2002 Management Concerns"?

19 A. Yes.

20 248. Q. The second star down says, "The sales
21 funnels (new opps) are very small"?

22 A. Correct.

23 249. Q. Do you recall what that referenced?

24 A. That just refers to that we weren't seeing
25 as much design activity in the market. Originally we

1 a line? They're not a line now?

2 A. No, they're not.

3 281. Q. Is Znyx a line?

4 A. No.

5 282. Q. So they were signed up in 2003 but they're

6 gone too?

7 A. That's correct.

8 283. Q. How about Adtron?

9 A. Yes.

10 284. Q. And SMA?

11 A. Yes, I believe they're still a line.

12 285. Q. What happened to Znyx?

13 A. I don't recall.

14 286. Q. About three lines down it says "Ongoing
15 Reseller/VAR conversations with Four Manufacturers"? Do
16 you see that?

17 A. Yes.

18 287. Q. What does a "VAR" mean in J-Squared
19 Nomenclature?

20 A. Value Added Reseller.

21 288. Q. It's a particular type of relationship that
22 J-Squared has with certain manufacturers or suppliers?
23 Is that correct?

24 A. That's correct.

25 289. Q. How would you describe what that

1 relationship is when you're a Value added -- did you say
2 Reseller?

3 A. A Value Added Reseller -- so you would buy
4 product, add some value to it -- it might you load some
5 software on it or you package it in a box and then you
6 resell it.

7 290. Q. It says you had conversations with four
8 manufacturers. Was part of J-Squared's strategy to try
9 and become a VAR for more manufacturers and let's make a
10 higher margin than just the commission rate it did as an
11 Independent Rep?

12 A. I can't answer that accurately I don't
13 think. Claude would be in a better position to answer
14 that.

15 291. Q. Okay, I should talk to -- how do you say his
16 last name?

17 A. Claude Langlois.

18 292. Q. Then it says, "Harris House Account Program
19 turned over to J-Squared, 1.5 million plus"? Do you
20 recall what that was referencing?

21 A. Again, it's not firm but I believe -- so
22 it's speculation that Motorola turned over Harris to us
23 which was a House Account for Motorola based on the
24 numbers not being where we expected or they expected
25 them to be for us.

1 A. I have to look. If I can see through the
2 rest of the Presentation I could probably tell you
3 but ---

4 300. Q. That would be great, yes. Take a second. I
5 couldn't tell?

6 A. I think this is just referring to Western
7 Canada.

8 301. Q. Okay and not Pacific North West?

9 A. That's correct.

10 302. Q. Let's go back then to 1929, please? Let's
11 go to 1930?

12 A. Yes.

13 303. Q. The first line says, "MCG 1H 03 Revenue is
14 substantially less than expected". What would you
15 interpret "1H 03" to mean?

16 A. That would be the period for January 1st,
17 2003 until June 31st, 2003.

18 304. Q. So that would be the first Half of 2003?

19 A. That's correct.

20 305. Q. MCG is the business unit of Motorola that
21 you were repping for at J-Squared?

22 A. Yes.

23 306. Q. And so, by this point, you're realizing that
24 the Motorola revenue is substantially less than
25 expected? Correct?

1 A. That's correct.

2 307. Q. If you go to the next page for all of ESG,
3 it would appear that the overall revenue for ESG, not
4 just for Motorola but for the other suppliers that had
5 been added was substantially less than initially
6 forecasted? Is that correct?

7 A. That's what it appears.

8 308. Q. Is that based on your recollection at least
9 in part due to the business conditions that J-Squared
10 was confronting on the market place?

11 A. I don't think so. My recollection would be
12 that in some cases it takes a while before revenue
13 starts and Claude really may have missed that.

14 309. Q. You mean over-Forecast for the year
15 initially?

16 A. On the revenue side of it to J-Squared, yes
17 -- not the sales side of it. The actual sales occurred
18 but it takes usually three to four months to get paid.

19 310. Q. Is it fairly common that the supplier or
20 manufacturer pays J-Squared when the manufacturer or
21 supplier actually gets paid by the consumer?

22 A. I'd say 90 percent.

23 311. Q. Let's go to JS1945, please? This has
24 Commissions and Margin Forecasts for the whole year? Is
25 that correct?

1 day on our cash flow. So the sales -- they report --
2 they forecast in dollars but we probably forecasted a
3 flat Canadian dollar not a 25 percent change with our
4 crystal ball.

5 346. Q. Well forecasts are by their nature just
6 estimates? Correct?

7 A. Correct.

8 347. Q. They're subject to changing business
9 conditions? Correct?

10 A. Correct.

11 348. Q. And bad luck? Well sometimes you think
12 you'll get an account and you don't get it? Correct?

13 A. Correct.

14 349. Q. Do you ever recall seeing any written
15 forecast that Motorola provided to you or anyone else at
16 J-Squared for 2003 or beyond 2003 for the MCG Business?

17 A. No.

18 350. Q. The next entry says, "Opportunity quantity
19 and dollars are way down". We've seen similar entries
20 in the two documents we've looked at?

21 A. Yes.

22 351. Q. This was still the case by July of 2003?

23 A. Yes.

24 352. Q. That was fairly wide spread across the
25 divisions including ESG?

1 A. Correct.

2 353. Q. The bottom says, "The next three months will
3 be the toughest for J-Squared". Was that an entry you
4 made?

5 A. I believe.

6 354. Q. Do you recall what you intended to convey?

7 A. Well just that because of the Canadian
8 Dollar's rapid change, we were adjusting very -- it was
9 a very difficult adjustment for our business.

10 MR. PAPETTI: Have we been at it for an hour?
11 Does anybody -- do you want to take a break?

12 THE WITNESS: I'm fine.

13 MR. BELLEW: How long are your tapes? Two
14 hours?

15 MR. COURVILLE: Two hours. Yes, I've got a half
16 hour.

17 (OFF RECORD DISCUSSION)

18 BY MR. PAPETTI:

19 355. Q. During the time that the Motorola contract
20 was in place with J-Squared Canada, do you recall
21 meeting with particular Motorola people during the time
22 it was actually in place?

23 A. Yes.

24 356. Q. Who do you recall meeting with?

25 A. Actually no, I don't. I think it was before

1 position?

2 A. Yes.

3 379. Q. Is Starvoy, in any way though, a formal
4 subsidiary of J-Squared or vice versa?

5 A. No.

6 380. Q. To your knowledge does Starvoy have any sort
7 of relationship with Motorola at this time?

8 A. No.

9 381. Q. The little icon has a caption for the
10 Presentation. It says "J2 MCG VAR September, 2003
11 Presentation"?

12 A. Correct.

13 382. Q. Is that correct? Did you interpret that to
14 be -- VAR to be Value Added Reseller?

15 A. That's what I would assume.

16 383. Q. Let me ask you some questions about this
17 document. Is it fair to say, just sort of as an
18 overview that by this time, mid-September of 2003, J-
19 Squared was trying to change its relationship with
20 Motorola to make the relationship more financially
21 worthwhile from J-Squared's perspective?

22 A. I believe that would be the case or we were
23 exploring ideas on how we could at least make it a
24 break-even.

25 384. Q. So, it's not performing very well, it's not

1 billion to 10 billion. I know what -- this was probably
2 similar. Losing 66 percent of your business is a pretty
3 big drop in business.

4 390. Q. Let's go to Page 1672. The first heading
5 is, "Existing Distribution Partners have not
6 demonstrated the willingness to invest in Canada? Who
7 did you understand the existing Distribution Partners to
8 be at the time?

9 A. Aero, Avnet, Tracan.

10 391. Q. Was it J-Squared's position at this time
11 that they were not doing enough to -- the term I think
12 you always use is "generate demand creation"?

13 A. That's correct.

14 392. Q. In Canada, and was J-Squared proposing that
15 it would take on some Distribution Functions in part
16 because the other Distributors weren't doing a full job
17 in Canada?

18 A. I need to look at this Presentation
19 again ---

20 393. Q. Yes, feel free? It's not that long?

21 A. That looks like that's the case.

22 394. Q. What's the case? I'm sorry?

23 A. That we were looking to resell the Motorola
24 product into the market.

25 395. Q. And thus make a Distribution Margin in some

1 cases as well as a commission when you actually
2 generated the sales?

3 A. Some of the contracts that we've signed, we
4 don't get commissions if we become -- if we're a
5 Distributor -- others we do.

6 396. Q. Others are mixed Distribution Margin and
7 Commission?

8 A. That's correct so it's more of a stocking
9 rep model where for larger -- usually, I'd say ninety-
10 plus percent where we've done this -- we haven't done
11 that -- so if we do it as a Distributor we do not get a
12 commission. If we do the business as a Distributor.
13 The higher volume business in the larger accounts -- we
14 do it on the Rep Model. That's the term Stocking Rep.

15 397. Q. Okay. Go to 1674 please? This is J2
16 Challenges or I guess J-Squared Challenges. It says,
17 "What are our options" and one of the options at the
18 bottom is "Change our Rep Model from Limited Line Card,
19 five to 10 lines, to Expanded Line Card, 20 to 30 lines?

20 A. Right.

21 398. Q. Do you recall what the thinking was there?

22 A. Well to bring in additional revenue there
23 really are two options available in a business like
24 ours. You can stick with the same ones you have and
25 generate more revenue with a different model which

1 There might be one in all I gave you but I'm assuming I
2 didn't mark the right one because I keep a lot of e-
3 mails.

4 464. Q. You mean the right one in response?

5 A. That's correct with feedback.

6 465. Q. Let's go to 1678, please? This is the J-
7 Squared Proposal. Did you understand this to be J-
8 Squared's Proposal to Motorola or what was in it?

9 A. That's correct. Sorry.

10 466. Q. And this would have -- would this have J-
11 Squared becoming a Distributor, in part for Motorola in
12 Canada?

13 A. Yes.

14 467. Q. Who was Tracan? Tracan was a Distributor
15 for Motorola in Canada whose contract was being
16 terminated? Is that accurate?

17 A. That's kind of what I've heard second-hand.

18 468. Q. And J-Squared was hoping to pick up some of
19 the Distribution Business that Tracan was doing?

20 A. Correct.

21 469. Q. Let's go to the last page, the conclusion?
22 The second bullet says, "There's a need to create a new
23 business model that better aligns MCG and J-Squared
24 ROI"? Do you see that?

25 A. Yes.

Page 1

1 Volume: I
2 Pages: 1 - 265
3 Exhibits: 106 - 109

4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE DISTRICT OF DELAWARE

6 -----X

7 J-SQUARED TECHNOLOGIES, INC.,

8 a Canadian corporation and

9

10 J-SQUARED TECHNOLOGIES (OREGON)

11 INC., an Oregon corporation,

12 Plaintiffs,

13 v.

COPY

14 MOTOROLA, INC., a Delaware corporation,

15 Defendant.

16 -----X

17 VIDEOTAPED DEPOSITION of STEVEN MACHERNIS,

18 a witness called for examination by the

19 Plaintiffs, taken pursuant to the Applicable

20 Provisions of the Delaware Rules of Civil

21 Procedure, before Laurie K. Langer, Registered

22 Professional Reporter and Notary Public in and

23 for the Commonwealth of Massachusetts, at the

24 offices of Bingham McCutchen, LLP, 150 Federal

1 continuation of the manufacturers rep
2 relationship?

3 A. No, I'm not familiar with the parallel string of
4 e-mails, but I am, I am familiar with
5 discussions that we had about gathering the data
6 and making the assessments to see what made
7 sense territory by territory.

8 Q. Did you ever send or receive any e-mails from
9 Kevin Parslow that related to an examination of
10 perhaps continuing in the relationship with
11 these MRs?

12 A. I don't recall a specific e-mail that said we
13 should continue with, you know, these three or
14 this one or these ten MRs. What I do recall is
15 that there was communications about which ones
16 had met performance criteria, which ones hadn't,
17 and subsequent discussions surrounding the, the
18 feasibility of, you know, does it make sense
19 from a business strategy perspective to have a
20 network of three manufacturer reps or five
21 manufacturer reps.

22 Q. Okay.

23 A. At some point in time you say, hey, the
24 administrative costs of managing a small handful

1 Q. Let me, let me see if I can't read a couple
2 lines from the deposition of your colleague
3 Mr. Crawford. This is a question that I
4 presented to him when he was deposed on December
5 6th. "Question: Was there any real intent on
6 Motorola's part to allow the manufacturers reps
7 to cure any perceived non performance?
8 Mr. Talbot: Object to form. Question: Was
9 Motorola really interested in seeing that
10 happen? Answer: No." Do you take exception
11 with Mr. Crawford's testimony on that same
12 issue?

13 MR. PAPETTI: Object to form.

14 A. I guess my answer would depend on what time
15 frame did you, were you asking Kim that
16 question. Was it, was it in February of '04 or
17 was it in November of '03 or was it in July of
18 '03? Because the answers change based on the
19 time frame. And we subsequently came to the
20 conclusion that there were enough MRs who were
21 failing performance metrics that it just didn't
22 make sense to continue with the program.

23 Q. So as of the date of the termination letters
24 you'll agree that Motorola had no intention or

1 Volume: I
2 Pages: 1 - 268
3 Exhibits: 110

4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE DISTRICT OF DELAWARE

6 -----X

7 J-SQUARED TECHNOLOGIES, INC.,
8 a Canadian corporation and

9
10 J-SQUARED TECHNOLOGIES (OREGON)
11 INC., an Oregon corporation,

12 Plaintiffs,

13 v.

14 MOTOROLA, INC., a Delaware corporation,
15 Defendant.

16 -----X

17 VIDEOTAPED DEPOSITION of KEVIN PARSLOW, a
18 witness called for examination by the
19 Plaintiffs, taken pursuant to the Applicable
20 Provisions of the Delaware Rules of Civil
21 Procedure, before Laurie K. Langer, Registered
22 Professional Reporter and Notary Public in and
23 for the Commonwealth of Massachusetts, at the
24 offices of Bingham McCutchen, LLP, 150 Federal

COPY

1 A. 14B.

2 Q. So you've seen the Oregon contract. Do you
3 recall ever seeing the Canadian contract?

4 A. I don't recall it. Having read through it. We
5 had contracts people that would do that.

6 Q. As far as the, these contracts are concerned,
7 these are two in a series of nine contracts --

8 A. Right.

9 Q. -- that were executed; you're aware of that?

10 A. Yes, I am.

11 Q. And while my two separate clients are two of the
12 reps involved in this, we'll call it this
13 manufacturers representative relationship, there
14 were seven others?

15 A. Uh-huh.

16 Q. Are you aware that the, the nine contracts are,
17 are somewhat similar, --

18 A. Yes.

19 Q. -- at least?

20 A. Yeah.

21 Q. And for the most part, and we've had some
22 testimony on this earlier, they're identical
23 and, to a great extent; you're aware of that?

24 A. Yep.

1 A. Correct.

2 Q. Was Miss Vittori the general manager up until
3 April of 2004 to the best of your recollection?

4 A. Correct. She was general manager at the time I
5 left.

6 Q. Was it -- let me strike that.

7 Do you know, do you recall when
8 Miss Vittori actually came on as the general
9 manager?

10 A. No, I don't.

11 Q. Do you know who the general manager was at the
12 time a decision was made by Motorola to
13 terminate the nine manufacturers representative
14 contracts?

15 MR. PAPETTI: Object to form.

16 A. That would be Wendy Vittori because that was,
17 any decisions that were taken were taken just
18 before I left.

19 Q. Who made that decision?

20 A. To terminate, the decision to terminate any rep
21 contracts?

22 Q. (Nods in the affirmative.)

23 A. That was initially my decision.

24 Q. And when you say initially your decision?

1 A. Because again from recollection, and you perhaps
2 can help me clarify this, is that those
3 agreements were terminated within a few weeks of
4 me leaving the organization and at that point my
5 responsibilities were not covering manufacturer
6 reps of North America, we had recruited my
7 replacement.

8 Q. Would that have been Dana Huth?

9 A. Correct.

10 Q. And Dana Huth actually signed the letters that
11 went out on February 26, 2004?

12 A. I believe so, yes.

13 Q. But you had actually made that decision, you
14 being the person within Motorola that had the
15 authority to do that at some point prior to
16 those letters going out?

17 A. Yes, within a few weeks of them, yeah.

18 Q. Your ultimate decision to do that, was that a
19 result of a process of analyzing these
20 contracts?

21 A. The decision was taken on the basis of analyzing
22 the financial aspects of the operation of
23 working with manufacturer reps.

24 Q. When did you begin that analysis?

1 A. I couldn't tell you the exact date but it will
2 be late 2000 and --

3 Q. 3?

4 A. The terminations were --

5 Q. 4?

6 A. Yeah, it would be late 2003 was when we started
7 to do the analysis.

8 Q. Okay. Did you have any issues with those
9 contracts even dating back to the beginning of
10 2003?

11 MR. PAPETTI: Object to form.

12 A. Can you clarify what you mean by "issues."

13 Q. At some point it became clear to Motorola that
14 they were no longer interested in pursuing this
15 sales strategy; correct? They were no longer
16 going to utilize these manufacturer
17 representatives?

18 A. The decision on manufacturer representatives was
19 taken on financial grounds, not contractual
20 grounds. It was based on the analysis that I
21 instigated late 2003 to see what return we were
22 getting on the approach of using manufacturer
23 reps and whether it was financially viable going
24 forward.

1 Q. Okay. So I think what you're saying to me is
2 that by some point later in 2003 you had enough
3 financial information that served as the impetus
4 for a decision to end these manufacturers reps
5 contracts; is that correct?

6 MR. PAPETTI: Object to form.

7 A. I don't think I could tell you the date. It was
8 certainly into 2004 before we collected, I
9 believe, all the data. And very close to the
10 point at which these contracts were terminated.

11 Q. Okay. Other than that collection of this
12 financial data, --

13 A. Uh-huh.

14 Q. -- do you recall at anytime in 2003 there being
15 other concerns, your concerns regarding the
16 feasibility of utilizing manufacturers reps in
17 the way that Motorola was using them?

18 A. No.

19 Q. There was no issues regarding performance
20 standards?

21 MR. PAPETTI: Object to form.

22 A. That is the financial reasons. I mean, the
23 issue is that it costs money to employ, pay
24 commission to manufacturer reps and they're

1 expected to contribute new business. And the
2 financial analysis was based on what new
3 business was being generated against what costs
4 were being incurred, paying manufacturer reps on
5 existing business that we had already brought in
6 and effectively handed to them a startup cost
7 payment.

8 Q. Those startup cost payments, what was the
9 purpose of those?

10 A. To help them fund any additional, additional,
11 any investment they would need to grow that
12 business.

13 Q. Okay. And the purpose, the objective of this
14 relationship with the manufacturers reps was to
15 have outside sales professionals attain these
16 Design Wins for the company; correct? Isn't
17 that the objective?

18 A. The objective -- in essence, yes. The objective
19 is that they would supplement the worker,
20 Motorola's own direct sales team.

21 Q. Your decision to terminate or end these
22 contracts, it obviously was made at some point
23 prior to your departure from Motorola?

24 A. Correct.

1 A. I don't recall anything specifically. No.

2 Q. Well, you had stated earlier that part of this
3 financial analysis with the reps and the
4 decision to terminate them was that you were
5 paying them money and expecting them to generate
6 business for you?

7 A. Correct.

8 Q. Was there any -- at some point, obviously, you
9 were dissatisfied with the amount of business
10 they were generating?

11 A. Correct. I didn't think it was reaching
12 anywhere close to the expectations.

13 Q. And at the same time do you recall there being a
14 concern that certain reps were being
15 overcompensated for work that they did not
16 generate? Historical work.

17 A. So, as I stated earlier on the two issues went
18 hand in hand. And we were always expecting to
19 pay for a period of six months or so commission
20 relating to business which was not generated by
21 the manufacturer reps to allow them to do the
22 investment of, they need to time wise to
23 generate the new business. They were always
24 very insistent on having an income stream and I

1 was happy to sign up and do that by allocating
2 accounts to them that they would earn commission
3 on. And the problem then became that there was
4 little, very little new business that was being
5 brought in and so it wasn't a case of the
6 commission payments going out being too high,
7 they were just too high commensurate with the
8 amount of business coming in.

9 Q. So there was an issue -- I guess going back to
10 my question. At some point there was an issue
11 that arose regarding the amount of commission
12 payments that the reps were getting consistent
13 with the business they were generating?

14 A. That's correct. And we were looking at our
15 overall cost base of the business at the back
16 end of 2003. And margin calculations and many
17 of the cost-based issues, this was one of a
18 number of things that we were looking at.

19 Q. And if I understand your testimony correctly,
20 and this is supplemented by what I've heard in
21 previous depositions, you were glad to provide
22 the reps with that revenue stream from the
23 inception of these contracts because it was
24 understood that it would take them at least

1 Miss Blair's testimony, her bringing to your
2 attention any anomalies in the commission
3 payment?

4 A. No, I don't recall it. When she refers to sales
5 management that could quite easily be Kim
6 Crawford and Steve Machernis, at that level.

7 Q. Or it could have been Paul Holt before then?

8 A. It could have been Paul Holt, depending on the
9 time.

10 Q. These commission payment anomalies, based on or
11 your testimony today are you saying that they
12 had nothing to do with the termination of these
13 contracts?

14 A. In isolation, that's correct. No, there's no,
15 there's no linkage there. My initiative to look
16 at the overall contractual position with
17 manufacturer reps was based on the overall
18 business within Motorola. Our cost base and the
19 projected future growth we could see using the
20 manufacturer reps to generate new business.

21 Q. How much interaction did you have with, I think
22 you already answered this with Miss Blair, it
23 was just basically on a monthly?

24 A. Occasionally. I work more with her boss Nina

1 contracts until the end of 2004.

2 Q. Can I get you to move on to the next exhibit
3 which is 16.

4 A. Do you have a copy of it?

5 Q. I do.

6 A. Thank you.

7 Q. At some point did you task Julie Blair with
8 performing an analysis as to the various
9 termination options under the contract?

10 A. She was tasked to, from what I remember, to do,
11 check the financial data on the costs and
12 revenue performance of the manufacturer reps and
13 to look at, you know, pending, depending on what
14 the result of that would be, what would be the
15 effective ways of us terminating those contracts
16 should we choose to do so.

17 Q. Okay, at some point the prospect of terminating
18 these contracts came up and --

19 A. Yes. Yeah, as part of a review.

20 Q. And this e-mail is actually, is sometime in
21 December of '03?

22 A. Yes.

23 Q. So as of this date that was at least one of the
24 possibilities that was being explored?

1 A. Yes.

2 Q. And was it you that tasked Miss Blair with doing
3 this analysis?

4 A. I believe so, yes.

5 Q. And did you tell her to look into the financial
6 exposure Motorola would have regarding its
7 pursuing certain termination options?

8 A. Yes.

9 Q. If you look at the first e-mail in that chain,
10 do you see that e-mail that's from Julie Blair
11 to Messrs. Machernis and Crawford?

12 A. Yes.

13 Q. What's your understanding of what's being
14 communicated in that e-mail? And you were
15 obviously copied on it as well?

16 A. Well, it looks as though she's requested of
17 Steve and Kim exactly what I asked for, which
18 was an analysis of, by rep, the position we're
19 in with them and what the costs would be to
20 Motorola to terminate the contracts under the
21 various terms.

22 Q. Okay. What is this, this last sentence supposed
23 to mean? "Please do what you can to make this a
24 thorough analysis as it seems like we are

1 that decision has been made, yeah, absolutely.

2 Q. Do you think that in any way motivated Motorola
3 to exercise a bias towards establishing cause
4 for the termination of the contract?

5 MR. PAPETTI: Object to form.

6 A. You would only terminate the contract if there
7 was good reason to do it, because of
8 performance. Performance would always be the
9 basis for this. If a distributor, sorry, a rep
10 was performing you wouldn't even be doing this
11 exercise.

12 Q. Well, that's an interesting question, because
13 your initial concern with performance was not
14 tied directly to Exhibit 4 performance
15 standards; correct? It was tied to some concern
16 you had with Optix and perhaps discussions that
17 you had with --

18 A. No, I didn't say that. No, I didn't say that.
19 What I said was, I'm going back even before the
20 Optix, the whole discussion we had earlier on
21 was based on the fact that we were paying money
22 on a regular monthly basis to help fund the
23 startup costs of the manufacturer reps, we were
24 not seeing a return in terms of revenue six

1 months in. We were not seeing it. So you go
2 back from revenue. If we're not getting revenue
3 are we getting Design Wins? If we're not
4 getting Design Wins are we getting committed
5 projects? If we're not getting committed
6 projects are we getting uncommitted projects?
7 The whole thing is a trail back from revenue.
8 It all starts at revenue.

9 Q. Okay.

10 A. And it's all been backtracked through that and
11 you end up at the point where you're saying
12 well, we're not getting performance, what are
13 the reasons for it. Is it competing product, is
14 it mind share, is it the fact they're not
15 trained up enough; is it the fact that they're
16 not good enough; is it the fact they don't know
17 the accounts; do they not have the contacts.
18 And ultimately you look at this and say, well,
19 these guys have had a good run of this; they
20 understand we're not going to continually fund
21 their efforts through existing business in
22 perpetuity. It was going to be for a fixed
23 period, three, four, six months. That period
24 gone into it's only fair that we look at what

1 we're doing overall, and if they're not
2 performing then we'll terminate the contracts.
3 Optix is merely a tool to look at the reasons
4 behind some of this.

5 Q. When in the life of the contracts were the reps
6 required to actually demonstrate revenue?

7 A. I can't remember. I have to refer to the
8 contract.

9 Q. Was it the third quarter?

10 A. From what you said -- let me have a look. Q2.
11 So that's anywhere between four and six months.
12 Which by my recollection on this contract would
13 put it anywhere between September and November.

14 Q. Was that consistent for all the contracts?

15 A. I don't know. I imagine if not exactly the
16 same, similar. It would depend on the maturity
17 of the individual marketplace that they're
18 operating in. But this would say that between,
19 unless I'm calculating, between September and
20 November we should have produced some measurable
21 significant revenue. So we would have been
22 monitoring that from September.

23 Q. This is an e-mail that was dated February 24,
24 '04, it's two days before these letters went

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3
4 J-SQUARED TECHNOLOGIES, INC., a)
Canadian corporation, and)
5 J-SQUARED TECHNOLOGIES (OREGON),)
INC., an Oregon corporation,)
6)
Plaintiffs,)

7 vs.) C.A. No. 04-960-SLR

8)
MOTOROLA, INC., a Delaware)
9 corporation,)
10 Defendant.)
_____)

11
12
13 DEPOSITION OF DENNIS ROBINSON
14 Taken on Monday, December 5, 2005
15 At 9:42 a.m.
16 At 40 North Central Avenue, 19th Floor
17 Phoenix, Arizona

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19
20
21
22 Job No. 7520

23
24 REPORTED BY: MICHAEL H. DIPPEL, RPR
Arizona CR No. 50716
Nevada CCR No. 701
25 California CSR No. 9409

COPY

1 Q. As far as you were concerned, was J-Squared
2 performing under its contract as of the date that you
3 requested this information?

4 A. My -- no. As I recall, when we rolled that
5 up, they were short against their criteria.

6 Q. Well, we'll get to that. I'm talking about
7 before you actually saw the information.

8 Did you have anything -- any information that
9 would lead you to believe that J-Squared was not --
10 J-Squared Oregon, of course, was not performing under
11 its contract?

12 A. I would characterize it to say that I
13 don't -- certainly didn't closely scrutinize their
14 contract. So, again, because J-Squared rolls up under
15 myself, I'm really looking at how I'm performing
16 against the territory. So they're one of the channels
17 that I use. So from that angle, I knew that we were
18 coming up short in design ins in the territory to be
19 sure.

20 Q. Did you ever communicate that to J-Squared
21 Oregon?

22 A. I don't think there's anything written
23 that -- that says that. Though, again, in the
24 day-to-day meanderings, in the monthly visits we did
25 together, it was implicit in our activities that we

1 were looking for design ins.

2 Q. Did you ever say to -- you had communication
3 with Steve Blomme; right?

4 A. Yes. I know Steve.

5 Q. And did you ever say to him, Steve, you know,
6 we're in October here, and we're a little concerned
7 about the design-in criteria? Have you ever that
8 conversation?

9 A. I couldn't recall any specific conversations
10 where I would have said that to him, though it would
11 not have been uncharacteristic to say something like
12 that.

13 Q. But you don't recall whether it happened or
14 not?

15 A. I can't specifically cite any conversations.

16 Q. Now, when you say that you had a concern
17 about the design wins, was that concern after you saw
18 the information from J-Squared Oregon or after?

19 A. I'd say I had a general concern for
20 design ins the entire year. That's something I watch.

21 Q. You had stated that, in connection with your
22 own sort of assessment of your performance --

23 A. Right.

24 Q. -- you had identified maybe some
25 shortcomings?

1 A. For supplemental information, right. That's
2 what that request said.

3 Q. Right.

4 A. It said I've got the information for these
5 accounts, can you -- got anything else, anything else
6 you want to tell me about? And that's basically --

7 Q. Was there -- what was your -- what was
8 your -- if you could flash back to late 2003, what was
9 your opinion of what kind of job J-Squared Oregon was
10 doing?

11 A. My general -- my general recollection of that
12 year was that we were behind on our design ins, and I
13 don't have any direct recollection of revenues. And my
14 direct recollection is that I got along real well with
15 all those guys. It's a good group of guys.

16 Q. So would you have anticipated that the
17 relationship would continue as far as you were
18 concerned?

19 A. I had no anticipation.

20 Q. Well, recognizing it's not your decision to
21 be made, you had -- you were not raising any objections
22 to your management by saying we need to replace
23 J-Squared Oregon?

24 A. I don't think I ever made any requests like
25 that.

1 Q. Okay. But -- and there wouldn't really have
2 been a basis for that request based on the performance
3 so far?

4 A. I don't recall ever making -- making any
5 request of that nature at all.

6 Q. Okay. Now, give me some specifics on your
7 belief that there were some issues with the design --
8 design wins.

9 A. Help me with that. What are you asking?

10 Q. You said that you -- you had a question
11 regarding whether they were -- whether you were --
12 meaning you and J-Squared --

13 A. Right.

14 Q. -- were meeting the predetermined criteria
15 for design wins.

16 A. Right.

17 Q. Can you expand on that?

18 A. Other than to say that both myself and
19 J-Squared are given design-in goals, generally, I
20 mostly care about my goals, but certainly their goals
21 are going to coincide with mine. They weren't
22 making -- we weren't having particularly good success
23 with design-in activity in that portion of the
24 territory in 2003 --

25 Q. Okay.

1 A. -- or '04.

2 Q. Could you flip back to page 20 of
3 Exhibit 14B, which is the performance criteria for
4 J-Squared Oregon?

5 A. Yes. This matrix we looked at before?

6 Q. Right.

7 Now, at the time you were looking for this
8 information, it was -- it was just at the inception of
9 the sixth month -- or I should say the seventh month
10 that J-Squared Oregon was involved in this endeavor;
11 correct?

12 A. Yes.

13 Q. And it appears that the only metric regarding
14 design wins that would apply to that time period was
15 one.

16 A. Yes.

17 Q. And that time period hadn't even elapsed yet.
18 So how could there have been a concern with design wins
19 yet when J-Squared Oregon wasn't even responsible for
20 having one at the time you were asking for the
21 information?

22 A. The concern is the continuum lasts all the
23 time. It doesn't -- the concern for design wins is
24 cumulative, but it's always there, so --

25 Q. Okay. But they hadn't -- they hadn't -- they

1 Q. (By Ms. Cates) Could it have provided a
2 basis for terminating for nonperformance?

3 A. It could have.

4 Q. Is it possible that J-Squared -- do you know
5 if J-Squared met the required 11 uncommitted accounts
6 for the end of quarter three?

7 A. I don't have any recollection specifically of
8 what their performance metrics were here when I was
9 asked to submit them, which was documented again in --
10 it looks like at least the request to document that was
11 in this Exhibit 73.

12 Q. So you don't know whether they met 11?

13 A. Yeah, I really -- I really don't have any
14 direct recollection.

15 Q. And, likewise, with the committed accounts,
16 you don't know whether they --

17 A. That's right. Just -- I just don't -- I
18 mean, this is a long time ago. I just don't --

19 Q. And with design wins, do you know whether
20 they were able to bring in a design win?

21 A. Yeah. To the best of my recollection, we
22 don't -- we didn't get any design wins.

23 MS. CATES: Okay. That's all I have.

24 ///

25 ///

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

J-SQUARED TECHNOLOGIES, INC., a)	
Canadian corporation, and J-SQUARE)	
TECHNOLOGIES (OREGON) INC., an)	
Oregon corporation,)	
)	
Plaintiffs,)	
v.)	C.A. No. 04-CV-960-SLR
MOTOROLA, INC., a Delaware corporation.)	
Defendant.)	

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